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Supreme Court No. _____
No. 57691-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

OLIVER WEAVER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

United States Constitution

Washington Constitution

Statutes

Court Rules

A. IDENTITY OF PETITIONER

Oliver Weaver, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Weaver seeks review of the Court of Appeals' decision dated June 1, 2010, for which a motion for reconsideration was denied on July 16, 2010. Copies of both rulings are attached hereto as Appendix A and B, respectively.

C. ISSUES PRESENTED FOR REVIEW

1. This Court previously remanded Weaver's case to the Court of Appeals to reconsider its decision that Weaver had waived any objection to the calculation of his offender score by failing to affirmatively object. Upon remand, the Court of Appeals again ruled that Weaver waived any objection because he did not say anything about his offender score at the sentencing hearing. Where Weaver was explicitly instructed by his attorney and the trial court that he should remain silent during the sentencing hearing, Weaver's attorney did not mention Weaver's offender score or criminal history at sentencing, and the record indicates the trial

court did not consider whether Weaver's prior convictions washed out, did Weaver actually relinquish his right to have an accurately calculated offender score?

2. Multiple convictions for the same offense violate double jeopardy even when the court imposes concurrent sentences. Here, the court and prosecution agreed Weaver's two convictions merged and the court imposed two concurrent sentences for Weaver's convictions. Where recent case law demonstrates that punishment for the two offenses violates double jeopardy, and the court intended to treat the offenses as one, did the Court violate double jeopardy by failing to strike one of Weaver's two convictions? Is the failure to strike a conviction that violates double jeopardy an issue that may be raised on direct appeal?

D. STATEMENT OF THE CASE

At Oliver Weaver's sentencing hearing, his attorney informed the judge that he had instructed Weaver "not to speak," because of a pending civil case and his interest in appealing the conviction. 4/8/05RP 378-79. Weaver's attorney had similarly instructed Weaver not to talk to the Department of Corrections when it prepared a presentence report. Id. at 378.

The sentencing judge acknowledged the attorney's explicit request that Weaver not speak. Id. at 380-81. The judge told

Weaver that she would not offer him the traditional opportunity to allocute prior to sentencing based on her "understanding that your attorney has advised you to remain silent at this time." Id. at 380-81.

At this sentencing hearing, Weaver's attorney did not discuss Weaver's criminal history other than noting it happened "in his younger days" and he had grown out of that. Id. at 378. Likewise, the prosecution did not mention Weaver's criminal history and instead focused on its request for an exceptional sentence above the standard range. Id. at 371-77. The prosecutor drew the court's attention to his memorandum requesting an exceptional sentence, which did not analyze Weaver's offender score. Id. at 371. The court imposed an exceptional sentence. CP -. In the judgment and sentence, the only criminal history the court found was two second degree burglaries from 1981 and 1985, without any reference to whether they had washed out. CP 81.

On appeal, Weaver argued that notwithstanding the exceptional sentence, the court relied on an incorrect offender score that included an offense that "washed out" according to the face of the judgment and sentence. The Court of Appeals ruled that Weaver was required to affirmatively object at sentencing, but this Court ordered the Court of Appeals to reconsider its original

sentencing analysis in light of its decision in State v. Mendoza, 165 Wn.2d 913, 929 n.8, 205 P.3d 113 (2009). State v. Weaver, 140 Wn.App. 349, 166 P.3d 761 (2007), rev. granted and remanded, 166 Wn.2d 1014, 212 P.3d 557 (2009).

Upon remand, the Court of Appeals ruled that Weaver did not object to the Department of Corrections report of Weaver's criminal history, and thus, he "cannot object to it now." Slip op. at 2. Without further discussion, the Court of Appeals affirmed Weaver's sentence on a theory that he waived any objection to his criminal history by not affirmatively objecting during the trial court proceeding.

Weaver also raised a second sentencing issue, explaining that under a recent change in the law, Weaver's two convictions for the same offense violated double jeopardy and could not be separately counted as prior convictions. The Court of Appeals ruled that Weaver could not raise this issue on direct appeal, but must make any double jeopardy claim in a personal restraint petition.

The underlying facts are further set forth in the original Court of Appeals opinion, 140 Wn.App. at 350-53; Appellant's Opening Brief, pages 3-5; and Appellant's Supplemental Brief, passim. The facts as outlined in each of these pleadings are incorporated by

reference herein.

E. ARGUMENT

1. THE COURT OF APPEALS WAIVER ANALYSIS DIRECTLY CONFLICTS WITH MENDOZA AND PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE

a. The State has the burden of proving an offender's criminal history. Sentencing authority derives strictly from statute, subject to the constitutional rights to due process, a jury trial, and prohibition against cruel and unusual punishment. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536-38, 159 L. Ed. 2d 403 (2004); State v. Ammons, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986); U.S. Const. amends. 6[1], 8[2], 14[3]; Wash. Const. art. I, sections 3, 22.[4] Due process requires the State bear the burden of

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[1] The Sixth Amendment provides, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

[2] The Eighth Amendment provides, "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted." Washington Constitution, Article I, section 14 likewise states, "excessive bail shall not be required, . . . nor cruel punishment inflicted."

[3] The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . .."

[4] Article I, section 3 guarantees due process of law, while Article I, section 22 provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in

proving an individual's criminal history and offender score by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999).

Where the record fails to support the criminal history and offender score calculation, the defendant is denied the minimum protections of due process. Id. at 481. Such an error may be raised on appeal even if no objection was raised below. Id. at 484-85; In re: Personal Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002).

In Mendoza, this Court ruled that an "affirmative acknowledgement" of criminal history is necessary and is not established by a bare assertion. 165 Wn.2d at 928-29. The court must find that a criminal history is proven by facts or information establishing that history by a preponderance of evidence. Id. at 929. The State bears the burden of proving the existence and validity of prior convictions at sentencing. Mendoza, 165 Wn.2d at 921. Proof of criminal history may not rest upon mere allegation to satisfy the fundamental requirements of due process under the Fourteenth Amendment and Article I, section 3 of the Washington Constitution.

b. Complete silence by the court and attorneys

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which the offense is charged to have been committed and the right to appeal in all cases

regarding criminal history does not demonstrate that the State proved that history by a preponderance of the evidence. At Weaver's sentencing, the court and parties focused entirely on whether Weaver should receive an exceptional sentence. 4/8/05RP 371-83. His offender score was such an afterthought that the State never filed any official report documenting Weaver's criminal history. On appeal, the prosecution explained that there was a document prepared by the Department of Corrections that listed Weaver's criminal history. This document has never been filed and never acknowledged to have been before the sentencing court by anyone other than the appellate prosecutor.

At Weaver's sentencing hearing, he had been instructed by the lawyer to remain silent. 4/8/05RP 378-79. His lawyer also directed him to remain silent when questioned by the DOC personnel preparing a presentence report. The sentencing judge cemented Weaver's silence by not even asking him to speak at the sentencing hearing. Id. at 380-81.

During the pendency of the appeal, the Court of Appeals granted the appellate prosecutor's request to supplement the record with a presentence report signed by the Department of Corrections that was never filed in the trial court. The Court of Appeals granted the motion to supplement over Weaver's

objection. The State provided no evidence that this was the same document presented to the parties or court during the sentencing hearing.

The Court of Appeals found Weaver's silence as to his offender score, in the face of this presentence report that was never filed at the time of sentencing, constituted an affirmative acknowledgment of his prior convictions and their use against him in calculating his offender score. Slip op. at 2. The Court of Appeals completely disregarded the on-the-record request that Weaver's attorney made that Weaver would remain silent. 4/8/05RP 380-81. The court expressly informed Weaver that it understood he would not even pled for leniency, notwithstanding his right of allocution, based on his attorney's instruction that he not speak to either the court or the Department of Corrections. 4/8/05RP 378, 380-81; see State v. Canfield, 154 Wn.2d 698, 701, 116 P.3d 391 (2005) (discussing defendant's right to make statement to court before sentencing). Yet even though Weaver had been directed by his lawyer not to talk to the court or the Department of Corrections, the Court of Appeals ruled that his failure to object to the completeness and accuracy of a report generated by the Department of Corrections, without regard to whether it was filed in the trial court, as an irrevocable and

permanent concession to the accuracy of his criminal history.

The trial court explicitly found Weaver's relevant criminal history was only two second degree burglary convictions from 17 years before the charged offense and never determined whether they "washed out." RCW 9.94A.500(1); CP 81. Weaver did nothing affirmatively to acknowledge his criminal history. See Mendoza, 165 Wn.2d at 929. The information on which the Court of Appeals relied was not filed in the trial court at the time of sentencing and not acknowledged by Weaver who had been directed to remain silent.

The factual issues underlying the accuracy of Weaver's sentence should be resolved in the trial court. In the trial court, Weaver may have competent counsel address remaining legal and factual questions. The information in the supplemental record was never discussed during the original sentencing hearing, which was focused on whether Mr. Weaver should receive an exceptional sentence, and thus its accuracy not litigated. See 4/8/05RP 371, 374-80.

In Mendoza, the Court ordered a remand for resentencing in a case involving the same issue. 165 Wn.2d at 930. Remand to the trial court is appropriate and necessary in the case at bar. There was no "affirmative acknowledgment" of Weaver's felony

criminal history and or prior convictions by defense counsel at the original sentencing hearing; the document proffered by the State was not filed in the trial court; and the remaining factual issues should be properly litigated in an appropriate fact-finding court. 165 Wn.2d at 928. This Court should reimpose its earlier order issued shortly after the Supreme Court's ruling in Mendoza and remand the case for resentencing.

2. AS THE STATE CONCEDED AT SENTENCING, AND THIS COURT'S OPINION IN HUGHES DICTATES, WEAVER'S TWO CONVICTIONS VIOLATED DOUBLE JEOPARDY AND ONE MUST BE STRICKEN FROM THE JUDGMENT AND SENTENCE

Weaver was convicted of two offenses for one single act against the same victim: one count of rape of a child in the second degree and one count of second degree rape. CP 39-40 (verdict); CP 41-42 (amended information); CP 74-84 (judgment and sentence, attached as Appendix A). The court and prosecution agreed that the offenses merged and should not be counted as separate convictions at sentencing but the court did not strike one conviction from Weaver's criminal history. 4/8/05RP 372-73; CP 78. Pursuant to the recent decisions in State v. Hughes, 166 Wn.2d 675, 686, 212 P.3d 558 (2009), and State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007), the court's imposition of

convictions for rape in the second degree and rape of a child in the second degree violates the state and federal constitutional prohibitions against double jeopardy, and one conviction must be vacated.

a. The constitutional bar on double jeopardy prohibits multiple punishments for the same offense. The state and federal double jeopardy clauses reject the imposition of multiple punishments for the same offense. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995); U.S. Const. amend. 5; Const. art. 1, § 9. Double jeopardy is a constitutional issue that may be raised for the first time on appeal. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000). Review is de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same criminal conduct. Freeman, 153 Wn.2d at 770-71; North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). "Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or concurrently." State v. Womac, 160 Wn.2d 643, 657, 160 P.3d 40 (2007)).

In Hughes, this Court ruled that rape in the second degree and rape of a child in the second degree based on the same incident violate double jeopardy and one conviction must be vacated. 166 Wn.2d at 686. The Hughes Court reasoned that the two rape offenses "are the same in fact because they arose out of one act of sexual intercourse." Id. at 684. The Hughes Court cautioned that the purpose of the statutes should not be construed too narrowly. Id. at 684.

The court focused on whether the legislature intended to preclude multiple punishments. Id. at 684-85. The offenses of rape and rape of a child are listed in the same portion of the criminal code, which is a crucial consideration in discerning the intent to punish the same act separately. Id. at 685. The Hughes Court emphasized that in other cases, courts have "specifically recognized that the legislature did not intend one act of sexual intercourse" to require multiple punishments. Id. at 685-86 (citing State v. Birgen, 33 Wn.App. 1, 651 P.2d 240 (1982) (finding double jeopardy violation in rape and statutory rape convictions for same conduct); State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) (finding no double jeopardy violation in rape and incest convictions based on different placements in criminal code but citing Birgen favorably for offenses at issue in that case). Both offenses have

the same seriousness level and subject Weaver to the identical sentencing range. CP 75; RCW 9.94A.515.

As the court ruled in Hughes, and as the prosecution and trial court agreed in the case at bar, the legislature intended a single penalty for Weaver's two convictions based on offenses contained in the same portion of the criminal code and which rested on a single act of sexual intercourse against one person.

b. The prosecution and the court agreed the convictions must merge. At sentencing, the prosecution "acknowledged" that under the facts of this case, "the two crimes the defendant were [sic] convicted of do merge for sentencing purposes." 4/8/05RP 371. Likewise, the court found, "[t]hese two crimes do merge for sentencing." Id. at 383. The court calculated Weaver's offender score as if the two offenses were a single offense and did not separately count the offenses when determining Weaver's offender score. CP 74-78.

Yet despite the prosecution's concession that the offenses must merge, it revived the two convictions in its quest for an exceptional sentence, telling the court that despite the merger, "we do have two separate crimes." 4/8/05RP 376. The prosecution did not retreat from its concession that the offenses should merge and did not ask the court to separately count both offenses in Weaver's

offender score, but it admitted that it was asking the court to consider both offenses in deciding whether to impose an exceptional sentence. Id. The 250-month term requested and imposed appears to result from the adding together the high end of the standard ranges for each offense. CP 75.

The court voiced no disagreement with the merger of the offenses, and expressly ruled that must be treated as a single offense. 4/8/05RP 383. But in the judgment and sentence, the court's findings stated that Weaver was convicted of two offenses; it listed both offenses as offenses for which sentence was being imposed; and it imposed concurrent sentences for these two offenses. CP 74-78. Thus, despite its stated intent to merge the two offenses, the court in fact imposed sentences for both offenses without any indication that they should be treated as a single offense on the judgment and sentence.

Moreover, the judgment and sentence has a box that a court must mark if treating offenses as the same criminal conduct. CP 75. The court left this box unmarked, and thus did not order the offenses be treated as same criminal conduct. CP 75 (section (i) of "special verdict of findings"). Thus, the court did not treat the offenses as the same criminal conduct.

c. The required remedy is to remand the case for

resentencing. The judgment and sentence does not reflect the legal requirements of double jeopardy or the court's intended sentence and the prosecution's concession. All agreed that the convictions should not be separately imposed based on the facts of the case but the final written sentencing order inexplicably lists both convictions and imposes concurrent punishment for both offenses. CP 74-78.

In Womac, the Supreme Court rejected the prosecution's contention that when the court imposes only a single sentence, there is no double jeopardy violation. 160 Wn.2d at 656-57. The court explained, "[t]hat Womac received only one sentence is of no matter as he still suffers the punitive consequences of his convictions." Likewise, Weaver still suffers the consequences of two convictions even though the court apparently did not use both convictions in calculating his offender score.[5] Despite its proclaimed intent to merge the two convictions, the court imposed concurrent terms for the two offenses. Even though the court imposed an exceptional sentence, the prosecution asked the court to consider the two convictions in determining the length of the sentence imposed. 4/8/05RP 376. The court imposed an

[5] Because the court did not explain how it calculated Weaver's offender score, it is not clear exactly what analysis the court used, as explained in more detail in the argument below.

exceptional sentence that equaled the doubling of the high end of the standard range for the two offenses.

In light of the double jeopardy violation, as well as the inconsistency between the court's stated intent to merge the offenses and its actual imposition of two convictions and two sentences, remand for resentencing is required. Because the two offenses have the same seriousness level, the trial court may engage in further fact-finding to determine which conviction must be vacated. Hughes, 166 Wn.2d at 686 n.13.

d. Double jeopardy violations may be raised on appeal. The Court of Appeals rejected Weaver's double jeopardy claim without analysis. Although Weaver asked permission to add this issue to the appeal following remand, based on the changes in the law that occurred while his appeal was pending, the Court of Appeals did not prohibit him from adding this issue as a matter of timing. But by ordering that Weaver may raise a double jeopardy claim only in a personal restraint petition, without explaining why, the Court of Appeals decision is contrary to settled law. State v. Jackman, 156 Wn.2d 736,746, 132 P.3d 136 (2008); State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005); RAP 2.5(a).

F. CONCLUSION

For the reasons stated above, this Court should accept review under RAP 13.4(b)(2), (3) and (4).

Dated this 13th of August 2010.

Respectfully submitted,

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 57691-7-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
OLIVER W. WEAVER,	)	OPINION ON REMAND
	)	(UNPUBLISHED)
	)	
Appellant.	)	FILED: June 1, 2010
	)	

Ellington, J. — On August 27, 2007, this court issued its opinion in this appeal, affirming Oliver Weaver's convictions for second degree rape and second degree rape of a child with the consequence of impregnating a minor. Weaver also challenged his sentence, contending that the State offered no proof of his prior convictions and his silence in the face of the prosecutor's statement of criminal history did not amount to an acknowledgement of his offender score. We rejected this argument and affirmed the sentence. In so doing, we disagreed with the opinion of Division II of this court in State v. Mendoza,[1] which held that the reference to "presentence reports" in the acknowledgement statute, RCW 9.94A.530(2), applies only to documents prepared by the Department of Corrections. Rather, we held Weaver's failure to object to the prosecutor's presentence report of criminal history constituted acknowledgement under

[1] 139 Wn. App. 693, 162 P.3d 439 (2007).

the statute.

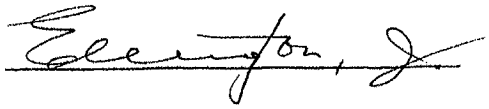
Before our opinion issued, the State sought to supplement the record on appeal to include the Department of Corrections statement of criminal history, which had been before the trial court but not made part of the court record. Because of our resolution of the issue, we denied this motion as unnecessary.

Weaver filed a petition for review. In April 2009, the Washington State Supreme Court affirmed Mendoza.[2] On July 8, the court granted Weaver's petition "only on the offender score issue" and remanded to this court "for reconsideration in light of" Mendoza. We granted the State's renewed motion to supplement the record, and requested supplemental briefing.[3]

We again affirm. The Department of Corrections criminal history report was before the court and was not objected to. Under Mendoza, therefore, Weaver acknowledged his offender score and cannot now object to it.

Weaver seeks to advance a new argument, alleging a double jeopardy violation. We agree with the State that this argument must be raised in a personal restraint petition.

Affirmed.



[2] State v. Mendoza, 165 Wn.2d 913, 205 P.3d 113 (2009).

[3] In the interim, one member of the panel, Judge J. Coleman, retired.

WE CONCUR:

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. OLIVER W. WEAVER, Appellant.	No. 57691-7-I ORDER DENYING MOTION FOR RECONSIDERATION

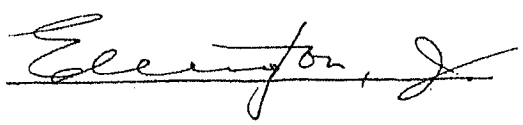
Appellant filed a motion for reconsideration of the opinion entered June 2, 2010. The panel has considered the motion and determined it should be denied.

Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 16th day of July, 2010.

FOR THE PANEL:



DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 57691-7-I** and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for ☒ **respondent: Brian McDonald - King County Prosecuting Attorney-Appellate Unit**, ☒ **appellant** and/or ☐ **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.

MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 13, 2010